

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORNA JOHNSON and DOUGLAS)	
BARNES,)	NO. CV-05-0344-LRS
)	
Plaintiffs,)	ORDER GRANTING FEDERAL
)	DEFENDANTS' AND UNITED STATES'
-vs-)	MOTION TO DISMISS; DENYING
)	PLAINTIFFS' MOTION TO
TIM PAUL; SUSAN MEREDITH; JIM)	STRIKE
PRUETT; and R. JOHNSON,)	
)	
Defendants.)	

PENDING BEFORE THE COURT without oral argument are Defendants' Motion to Dismiss (Ct. Rec. 5) and Plaintiffs' Motion to Strike (Ct. Rec. 7).

On October 31, 2005, plaintiffs' filed a complaint alleging twenty-one claims against the defendants, individual Internal Revenue Service (IRS) employees for "violations of IRS collection practices guidelines" , including the filing of a notice of a federal tax lien. Complaint (Ct. Rec. 1) at 2. Plaintiffs seek compensatory damages in the amount of one million dollars. Complaint at 8. Defendants now seek dismissal of the plaintiffs claims asserting the defenses of lack of personal and subject matter jurisdiction, failure to exhaust administrative remedies and failure to state a claim.

1 **I. PLAINTIFFS' MOTION TO STRIKE**

2 Plaintiffs move the court to strike the motion filed by the federal
3 defendants arguing essentially that defense counsel has filed a frivolous
4 pleading and he is "an interloper to this cause."

5 Federal Rule of Civil Procedure 12(f) provides that "the court may
6 order stricken from any pleading "any insufficient defense or any
7 redundant, immaterial, impertinent, or scandalous matter." A motion or
8 a response to a motion, however, is not a "pleading" as contemplated by
9 the Federal Rules. See Fed.R.Civ.P. 7 (listing types of pleadings
10 allowed). Thus, "only pleadings are subject to motions to strike" filed
11 pursuant to Rule 12(f). *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880,
12 885 (9th Cir.1983). Accordingly, plaintiffs' motion to strike the
13 defendants' motion is inappropriate. Furthermore, the Court sees no
14 other possible basis for striking defendants' motion. Plaintiffs' Motion
15 to Strike (Ct. Rec. 7) is **DENIED**.
16

17 **II. DEFENDANTS' MOTION TO DISMISS**

18 **A. Legal Standard**

19 When considering a motion to dismiss, the Court must "treat all of
20 the well-pleaded allegations of the complaint as true." *Miree v. DeKalb*
21 *County*, 433 U.S. 25, 27 n. 1, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). The
22 Court must construe all the allegations in the light most favorable to
23 the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40
24 L.Ed.2d 90 (1974). "A court may dismiss a complaint only if it is clear
25 that no relief could be granted under any set of facts that could be
26

1 proved consistent with the allegations." *Hishon v. King & Spalding*, 467
2 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). It must appear beyond
3 doubt that the plaintiff can prove no set of facts in support of his
4 claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41,
5 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

6 **B. Motion to Dismiss Individual Defendants and for Substitution of**
7 **the United States as the Proper Defendant**

8 The plaintiffs have named individual IRS employees as defendants in
9 this matter. A cause of action for damages based on alleged
10 unconstitutional conduct may be maintained against federal officials
11 pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of*
12 *Narcotics*, 403 U.S. 388, 389-90, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).
13 However to the extent plaintiffs' complaint can be broadly construed to
14 request relief appropriate in a *Bivens* action against the individually
15 named defendants, the Ninth Circuit has foreclosed that opportunity.
16 *Adams v. Johnson*, 355 F3d 1179, 1186 ("Because the Internal Revenue Code
17 gives taxpayers meaningful protections against government transgressions
18 in tax assessment and collection, we hold that *Bivens* relief is
19 unavailable for plaintiffs' suit against IRS auditors and officials.").

21 To the extent that the defendants named in the Complaint are sued
22 because of action taken by Internal Revenue Service employees in their
23 official capacities, the United States would ordinarily be entitled to
24 be substituted as the proper party defendant. Such a suit is a suit
25 against the United States. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th
26 Cir. 1985); see also *Ferrel v. Brown*, 847 F.Supp. 1524, 1526

1 (W.D.Wash.1993), aff'd, 40 F.3d 1049 (9th Cir. 1994). Furthermore, this
2 action was filed seeking civil damages under IRS Code Section 7433 for
3 unauthorized collection action by the IRS. No such action may be
4 maintained against an individual officer or employee of the United
5 States. Rather, a civil action for wrongful levy or for civil damages
6 for unauthorized collection must be maintained against the United States
7 in a district court of the United States. 26 U.S.C. §§ 7426, 7433.

8 Under Fed.R.Civ.P. 21, "[p]arties may be dropped or added by order
9 of the court on motion of any party or of its own initiative at any stage
10 of the action and on such terms as are just." Because this action is
11 against defendants in their official capacities, the individually named
12 federal defendants must be dismissed from this action, and the United
13 States substituted as the proper defendant. For purpose of the Court's
14 consideration of the defendants' present motion, the Court will construe
15 the plaintiffs claims as against the United States.

17 **C. Motion to Dismiss United States**

18 The Court has concluded the only proper defendant in this action is
19 the United States. Nonetheless, plaintiffs have failed to state a claim
20 against the United States.

21 **1. Federal Tort Claims Act**

22 The allegations of extortion and conspiracy in the plaintiffs'
23 complaint sound in tort. However, the Federal Tort Claims Act
24 specifically excludes claims based upon the performance of a
25 discretionary function by a government officer and claims arising with
26

1 respect to the assessment and collection of any tax. 28 U.S.C. § 2680(a)
2 and (c). *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir.
3 1982). Accordingly, as plaintiffs claims fall within this exception to
4 the FTCA, this suit is barred by sovereign immunity and is subject to
5 dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

6
7 **2. 26 U.S.C. § 7433**

8 26 U.S.C. § 7433 is the exclusive statute under which plaintiffs
9 have brought and could bring an action against the United States, but
10 plaintiffs have failed to sufficiently plead facts that withstand
11 defendants' motion to dismiss. Plaintiffs have failed to show that they
12 have exhausted the administrative remedies required by 26 U.S.C. §
13 7433(d). While they argue in their response that they did exhaust their
14 administrative remedies as evinced by their July 25, 2005 and August 29,
15 2005 correspondence with various IRS officials, this correspondence does
16 not equate to exhaustion of remedies. There is no evidence that
17 plaintiffs filed any administrative claim(s) under Treasury Regulation
18 § 301.7433-1(e).

19 Therefore, under Fed.R.Civ.P. 12(b)(6), plaintiffs have failed to state
20 a claim against the United States upon which relief can be granted.

21 **III. CONCLUSION**

22 For the reasons set forth above, **IT IS HEREBY ORDERED:**

23 1. Plaintiffs' Motion to Strike (Ct. Rec. 7) is **DENIED**.

24 2. Defendants' Motion to Dismiss is **GRANTED**. The above-entitled
25 action shall be dismissed with prejudice and without the assessment of
26

1 costs.

2 The District Court Executive is directed to file this Order, **ENTER**
3 **JUDGMENT** in favor of the individually named defendants' and substituted
4 defendant, the UNITED STATES OF AMERICA, provide copies to the parties,
5 and **CLOSE THE FILE**.

6 **DATED** this 21st day of March, 2006.

7 *s/Lonny R. Suko*

8
9

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE